

CHAPTER 18: REVIEW OF ACTS RELEVANT TO RESTORATION MONITORING

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INTRODUCTION

The following summaries of the major Acts mentioned in this Volume, with the exception of the Rivers and Harbors Act of 1899, Magnuson-Stevens Fishery Conservation and Management Act, and the Estuary Restoration Act were obtained from Buck (1995). These Federal Acts may be used to help justify the restoration and monitoring of particular coastal habitats.

ANADROMOUS FISH CONSERVATION ACT

The Anadromous Fish Conservation Act (16 *U.S.C.* 757a-757g, Pub. L. 89-304, as amended) authorizes the Secretary of Commerce, along with the Secretary of Interior, or both, to enter into cooperative agreements to protect anadromous and Great Lakes fishery resources. To conserve, develop, and enhance anadromous fisheries, the fisheries which the United States has agreed to conserve through international agreements, and the fisheries of the Great Lakes and Lake Champlain, the Secretary may enter into agreements with States and other non-Federal interests. An agreement must specify: (1) the actions to be taken, (2) the benefits expected, (3) the estimated costs, (4) the cost distribution between the involved parties, (5) the term of the agreement, (6) the terms and conditions for disposal of property acquired by the Secretary, and (7) any other pertinent terms and conditions.

Pursuant to the agreements authorized under the Act, the Secretary may: (1) conduct investigations, engineering and biological surveys, and research, (2) carry out stream clearance activities, (3) undertake actions to facilitate the fishery resources and their free migration, (4) use fish hatcheries to accomplish the purposes of this Act, (5) study and make

recommendations regarding the development and management of streams and other bodies of water consistent with the intent of the Act, (6) acquire lands or interests therein, (7) accept donations to be used for acquiring or managing lands or interests therein, and (8) administer such lands or interest therein in a manner consistent with the intent of this Act. Following the collection of these data, the Secretary makes recommendations pertaining to the elimination or reduction of polluting substances detrimental to fish and wildlife in interstate or navigable waterways. Joint NOAA Fisheries-FWS hold regulations applicable to this program are published in 50 *C.F.R.* Part 401.

CLEAN WATER ACT

The Clean Water Act (CWA, 33 *U.S.C.* 1251-1387, Act of June 30, 1948, as amended) is a very broad statute with the goal of maintaining and restoring waters of the United States. The CWA authorizes water quality and pollution research and monitoring, provides grants for sewage treatment facilities, sets pollution discharge and water quality standards, addresses oil and hazardous substances liability, and establishes permit programs for water quality, point source pollutant discharges, ocean pollution discharges, and dredging or filling of wetlands. The intent of the CWA Section 404 program and its 404(b)(1) "Guidelines" is to prevent destruction of aquatic ecosystems including wetlands, unless the action will not individually or cumulatively adversely affect the ecosystem. NOAA Fisheries provides direct consultations to the Environmental Protection Agency and the U.S. Army Corps of Engineers as to the impacts to living marine resources of proposed activities and to methods for avoiding such impacts.

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ENDANGERED SPECIES ACT

The Endangered Species Act (ESA, 16 U.S.C. 1531-1543, Pub. L. 93-205, as amended) was enacted in 1973 to provide for the conservation of species that are in danger of extinction throughout all or a significant portion of their range. “Species” is defined by the Act to mean either a species, a subspecies, or, for vertebrates (i.e., fish, reptiles, mammals) only, a distinct population.

Anyone may petition to have a species considered for listing as endangered or threatened, the action which qualifies it for increased protective measures². NOAA Fisheries regulations concerning ESA listing procedures are published at 50 C.F.R. Parts 217-227, with joint NOAA Fisheries-FWS regulations appearing at 50 C.F.R. Parts 402 and 424-453. Generally, the U.S. FWS coordinates ESA activities for terrestrial and freshwater species, while NOAA Fisheries is responsible for marine species and Pacific salmon. Within 90 days of a listing petition’s filing, an agency decision is made on whether to reject the petition, or accept it for a further intensive status review of the species. If a status review is conducted, it is initiated with a public solicitation of information and data relevant to the species of concern. A species must be listed if it is threatened or endangered because of any of the following five factors: (1) present or threatened destruction, modification, or curtailment of its habitat or range, (2) overutilization for commercial, recreational, scientific, or educational purposes, (3) disease or predation, (4) inadequacy of existing regulatory mechanisms, and (5) other natural or manmade factors affecting its continued existence.

Additional important considerations for an ESA listing decision, especially concerning anadromous fish, include defining population

segments that qualify as species, determining the abundance threshold for threatened and endangered status, and determining the causes of decline. NOAA Fisheries will consider listing individual Pacific salmon populations only if they are evolutionarily significant units (ESUs), defined as “substantially reproductively isolated” and “an important component in the evolutionary legacy of the species” (56 *Federal Register* 58612, Nov. 20, 1991).

Economic considerations are not legally relevant to the listing decision, this decision is to be made solely on the basis of the best biological data available. Except for extensions due to consideration of other proposals, a one-year time limit is placed on making the decision to propose listing. If the agency proposes listing, public comments are again solicited on the proposed listing, and a final decision is made within one year after the issuance of the proposal.

Concurrent with the listing decision, critical habitat believed necessary for the continued survival of species is designated. For this decision, economic impacts must be considered. If information is insufficient to designate critical habitat at the time of listing, or if designation of critical habitat would not be “prudent,” the Government may take an additional year to identify it³.

Once a species is listed, recovery plans are prepared which identify mitigation measures to be initiated to improve the species’ status. In addition, the ESA Section 7 consultation process requires all Federal agencies to use their authorities to conduct conservation programs (mitigation measures) and to consult with NOAA Fisheries (or the FWS) concerning the potential effects of their actions on any species under the Act’s jurisdiction.

² However, either NOAA Fisheries or the FWS may initiate a status review for a species without a petition for listing.

³ If there is substantial disagreement regarding the sufficiency or accuracy of available data, this one-year period may be extended an additional six months.

ESTUARY RESTORATION ACT (ERA), TITLE I OF THE ESTUARIES AND CLEAN WATERS ACT OF 2000

The Estuary Restoration Act (ERA) of 2000, S. 835 was signed into law on November 7, 2000, to authorize expenditure of \$275 million over 5 years toward estuary habitat restoration. ERA established an interagency Council, consisting of representatives from the National Oceanic and Atmospheric Administration (NOAA), Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS), and the U.S. Army. The Estuary Habitat Restoration Council meets at least biannually to direct its policy including distribution of the Act's financial and technical assistance program for restoration projects. NOAA, a member of the interagency Council implementing the Estuary Restoration Act, is the lead agency for the restoration project database and monitoring protocols required under the ERA, with the goal of restoring one million acres of estuarine habitat by the year 2010. Backed by a strong federal commitment and allocated resources to restore the Nation's estuarine habitats, the Act covers: the bays, sounds, gulfs, harbors, lagoons, inlets and deltas where fresh water mixes with the salt water of the ocean along all US coasts and protectorates. The Act also includes the US coast of the Great Lakes. As a member of the Estuary Habitat Restoration Council, NOAA, including the National Centers for Coastal Ocean Science is part of an interagency effort to create and maintain effective partnerships for the promotion of estuary habitat restoration, and develop and enhance restoration monitoring and research capabilities.

FISH AND WILDLIFE COORDINATION ACT

The Fish and Wildlife Coordination Act (16 U.S.C. 661-666c, Act of March 10, 1934, as amended) requires that wildlife, including fish,

receive equal consideration and be coordinated with other aspects of water resource development. This is accomplished by requiring consultation with the FWS and NOAA Fisheries whenever any body of water is proposed to be modified in any way and a Federal permit or license is required. This consultation determines the possible harm to fish and wildlife resources, and the measures that are needed to both prevent the damage to and loss of these resources, and to develop and improve the resources, in connection with water resource development. NOAA Fisheries submits comments and recommendations to Federal licensing and permitting agencies and to Federal agencies conducting construction projects on the potential harm to living marine resources caused by the proposed water development project, and submits recommendations to prevent harm.

MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA, 16 U.S.C. 1801 et seq.) provides authority to the Secretary, through NOAA Fisheries, to conserve, manage, and monitor fisheries in the exclusive economic zone (EEZ). Fishery Management Plans must include a provision to describe and identify the Essential Fish Habitat (EFH), including adverse impacts, identify adverse impacts from fishing activities, minimize to the extent practicable adverse impacts from fishing, identify non-fishing sources of adverse impacts, and identify actions to encourage the conservation and enhancement of EFH. Federal agencies are required to consult with NOAA Fisheries on all actions that may adversely affect EFH. NOAA Fisheries is required to provide EFH conservation recommendations for any Federal or state activity that may adversely effect EFH. The action agency must respond in writing stating how it will avoid or mitigate adverse impacts on EFH, or explain why it will not follow NOAA Fisheries' recommendations.

Councils may comment on Federal or state actions which may affect the habitat of fishery resources and must comment if there may be substantial adverse effects to anadromous fish habitat.

NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA, 42 *U.S.C.* 4321-4347, Pub. L. 91-190, as amended) requires Federal agencies to analyze the potential effects of a proposed Federal action which would significantly affect historical, cultural, or natural aspects of the environment. It specifically requires agencies to use a systematic, interdisciplinary approach in planning and decision-making, to insure that presently unquantified environmental values may be given appropriate consideration, and to provide detailed statements on the environmental impacts of proposed actions including: (1) any adverse impacts, (2) alternatives to the proposed action, and (3) the relationship between short-term uses and long-term productivity. The agencies use the results of this analysis in decision-making. Alternatives analysis allows other options to be considered. NOAA Fisheries plays a significant role in the implementation of NEPA through its consultative functions relating to conservation of marine resource habitats.

NATIONAL MARINE SANCTUARIES ACT (TITLE III OF THE MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT)

The National Marine Sanctuaries Act (Title III of the Marine Protection, Research, and Sanctuaries Act) requires the Secretary to “assess damages to sanctuary resources.” The Act defines natural resource damages to include “the cost of replacing, restoring or acquiring the equivalent of a sanctuary resource, the value of the lost use of the resource pending its restoration, the cost of damage assessments, and reasonable monitoring.” The Act further requires the Secretary to conduct “research, monitoring, evaluation, and education programs...”

RIVERS AND HARBORS ACT OF 1899

The Rivers and Harbors Act of 1899, Section 10 (33 *U.S.C.* 403) requires that all obstructions to the navigable capacity of navigable waters of the United States must be authorized by Congress. The Secretary of the Army must authorize any construction outside established harbor lines or where no harbor lines exist. The Secretary of the Army must also authorize any alterations within the limits of any breakwater or channel of any navigable water of the United States.

References

Buck, E.H. 1995. Summaries of major laws implemented by the National Marine Fisheries Service. CRS Report for Congress. Congressional Research Service, Library of Congress, March 24, 1995.